

Before the
COPYRIGHT OFFICE
LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of)
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PROMOTION OF DISTANCE)
EDUCATION THROUGH)
DIGITAL TECHNOLOGIES)
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Docket No. 98-12A

**STATEMENT OF MARVIN L. BERENSON
ON BEHALF OF BROADCAST MUSIC, INC.**

My name is Marvin L. Berenson. I am Senior Vice President and General Counsel of BROADCAST MUSIC, INC. ("BMI").

I am testifying on behalf of BMI, a music performing rights licensing organization incorporated in New York, which licenses the public performing right in approximately three million musical works, including works by BMI's 180,000 affiliated songwriters, composers and publishers, as well as tens of thousand of foreign works that are licensed in the United States through BMI's agreements with over 55 foreign performing rights organizations.

On December 16, 1998, the Copyright Office ("Office") issued a Request for Comments and Notice of Public Hearing in this matter (at 63 Fed. Reg. 71167) to assist it in preparing recommendations to Congress as required by Section 403 of the Digital Millennium Copyright Act ("DMCA") (Public Law 105-304) on "how to promote distance education through digital technologies, including interactive

digital networks, while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.” Section 403 enumerates eight factors that the Register of Copyrights (“Register”) is to consider in making her recommendations to Congress. The Register is not required either to recommend legislation or to submit proposed legislation.

In connection with the eight criteria set forth in Section 403 of the DMCA, the Notice asks multiple questions pertaining to four specific areas: the nature of distance education, the role of licensing, the use of technology and the application of copyright law to distance education. Id. at 71168. Although necessarily touching on all four areas of inquiry, my statements will be primarily directed to the licensing of copyrighted works in the digital arena. BMI may address in written and reply comments other issues raised by the Notice after reviewing the statements of other parties on these matters.

I. DESCRIPTION OF BMI.

BMI licenses the public performing right in approximately three million works in its repertoire to music users in the fields of broadcast and cable television, radio and webcasting, concerts, restaurants, stores, Internet web sites, background music services, passenger vessels, trade shows, corporations, colleges and universities and a large variety of other venues. BMI operates on a non-profit-making basis. We distribute all of the licensing fees we collect to our affiliates after making deductions for our operating expenses and reasonable reserves.

BMI has played an important role in the development of the U.S. copyright law, in particular the Copyright Act of 1976 as well as the recently enacted DMCA. BMI's President, Frances W. Preston, served on the United States Advisory Council on the National Information Infrastructure which reported its findings to President Clinton in January of 1996. See, *A Nation of Opportunity: Realizing the Promise of the Information Superhighway* (January 1996). During the 104th Congress, I was an active member of the 17-person committee appointed by Representative Carlos Moorhead and guided by Representative Robert Goodlatte to negotiate a resolution to the issue of on-line service provider liability. During the 105th Congress, BMI representatives participated in myriad legislative activities that led to enactment not only of OSP liability reform (Title II of the DMCA) but also of other provisions of the DMCA.

In addition, BMI has been actively involved in issues involving the use of copyrighted materials in the educational arena, including distance education. For example, BMI participated in the April 27-28, 1998 intensive discussions on distance learning conducted by the Register and requested by Senators Orrin G. Hatch, Patrick J. Leahy and John Ashcroft. Judith M. Saffer, BMI's Assistant General Counsel, was a member of the Steering Committee of the Conference on Fair Use ("CONFU") established by the Clinton Administration's National Information Infrastructure Task Force Working Group on Intellectual Property. As a member of the subcommittees which examined the use of copyrighted materials in Multimedia and in Distance Learning, she participated in the drafting of the

proposed guidelines for Distance Learning and was instrumental in the drafting and endorsement of the guidelines for educational multimedia products.

Finally, BMI has been very active in international fora that have been and are considering issues related to copyright and digital technologies. Frances W. Preston is on the Executive Bureau and the Administrative Council of the International Confederation of Authors and Composers Societies (CISAC). I served as a member of the U.S. delegation to the World Intellectual Property Organization's ("WIPO") Conference on Certain Copyright and Neighboring Rights Questions, which successfully adopted the two treaties that were implemented by Title I of the DMCA, namely, the WIPO Copyright Treaty (which supplements the Berne Convention for the protection of Literary and Artistic Works ("Berne Convention")) and the WIPO Performances and Phonograms Treaty.

In sum, BMI is in the vanguard of institutions wrestling with issues of how continuing advances in digital technology should affect the rights of both copyright owners and users of copyright materials. Because any extension of existing copyright exemptions could affect the livelihoods of BMI's affiliated songwriters and music publishers, BMI's dedication to resolving these issues is appropriate.

II. CHALLENGES POSED BY DIGITAL TECHNOLOGIES.

As noted by so many parties submitting preliminary comments, digital technologies pose new challenges to authors and owners of copyrighted works. Unlike analog transmissions, the recipient of digital transmission of a work, be it a sound recording, a film or reams of copyrighted text, can make perfect, permanent

copies and further distribute them to countless additional recipients. The current Section 110(2) exemption permits transmissions of music to “classrooms” for educational purposes under certain prescribed criteria. Broadening the current Section 110(2) exemption to permit transmission of musical works – and other copyrighted works – to potentially unlimited recipients at unlimited locations, even if done so solely for educational purposes, raises serious concerns to BMI.

Dozens of interested parties have recognized these concerns as well and have submitted many useful suggestions on how to limit the wholesale copying and distribution of proprietary materials. Among them are limiting distance education transmissions to closed circuit television or an intranet. Others advocate the use of password and encryption technology should these materials be more widely distributed, albeit for educational purposes. BMI agrees that some form of protection against unauthorized uses is necessary, but firmly believes that market negotiations between intellectual property owners and users is the best way to address how such protections should be implemented. Indeed, the DMCA mandates the Librarian of Congress to undertake a separate inquiry as to encryption and anti-circumvention technologies. The anti-circumvention provision of Section 1201(a)(1) of the DMCA which deals with these issues do not go into effect for almost another two years. Accordingly, the Office should proceed extremely cautiously in making recommendations regarding distance education.

III. LICENSING BENEFITS OWNERS AND USERS OF COPYRIGHTED WORKS.

Let me state that BMI is a fervent supporter of education in general, and of distance education, in particular. BMI believes that music education is vital to developing an appreciation of music and the rights of those who create and perform it. For example, BMI's Doreen Ringer-Ross is president of the Board of Directors of the Mr. Holland's Opus Foundation, an organization spearheaded by BMI composer Michael Kamen, who wrote the score to the film. This group raises money to allow public schools to purchase musical instruments which they would not otherwise be able to afford. In addition, BMI personnel frequently participate in the "Grammy in the Schools" program, an educational outreach program sponsored by the National Academy of Recording Arts & Sciences which brings recording artists and other music industry executives to public schools. BMI also sponsors the Thelonious Monk Institute's annual award for excellence in jazz composition and runs its own jazz composers and musical theater workshops for aspiring writers. BMI also contributes to many educational organizations, including the Music and Entertainment Industry Educators Association, the International Association of Jazz Educators and the National Association of College Broadcasters. Finally, Theodora Zavin, BMI's Senior Vice President and Special Counsel is President of the BMI Foundation, Inc., a non-profit organization which gives grants to aspiring musicians in such fields of contemporary classical composition, jazz composition, conducting and film scoring.

In reviewing the dozens of preliminary comments filed by academic institutions, it is readily apparent that distance education is already an important

means by which students are taught at colleges and universities and the importance and availability of distance education is only likely to increase in the coming years. Indeed, submissions from secondary schools indicate that distance education technologies allow students in low-income rural areas to have access to educational programs that were previously available to students only in more affluent locales.

To the extent that any exemption for educational uses of digital technologies is required, BMI believes that the current law is more than adequate. The combination of the fair use exemption codified at Section 107 of the Copyright Act and the educational exemption codified at Section 110 already mean that certain educational uses of copyrighted works do not require licenses. Section 110(2) specifically applies to “transmissions.” Provided adequate technological measures are implemented to prevent unauthorized usage, BMI does not oppose the application of Section 110(2) to both analog and digital transmissions, recognizing that some clarifying adjustments to address digital technology may be necessary.

Indeed, the rapid and continuing growth of distance education programs seems to suggest that no further protective legislation is necessary. It does not appear that the expansion of distance education has been hampered by the present legislative framework. BMI is unaware of any trend in the case law of educational institutions suffering large copyright infringement judgments as a result of distance education activities. That possibility is now even more remote

as many colleges and universities, including Macalaster College, the University of Kentucky and the University of Maryland, are attempting to avail themselves of the protections provided OSPs under Title II of the DMCA. See, <http://lcweb.loc.gov/copyright/onlinesp/list>.

The overwhelming majority of educators and copyright owners who filed comments agree that an appropriate balance between the rights of copyright owners and the interest of users of copyrighted materials needs to be reached, an objective properly emphasized in the Office's Notice. How far to one side or the other the balance is tilted is a matter of contention. BMI believes that those who advocate a broad-based exemption for distance education are proposing a short-sighted and ultimately counterproductive approach. As with the incorporation of technological measures, we believe that a better approach here would be to let the market determine the proper balance based upon the existing legislative framework. The digital technologies involved in distance learning are rapidly continuing to evolve. Just as the marketplace has guided the development of the means to have effective, interactive distance education, BMI believes that, given the opportunity, marketplace negotiations will lead to the application of new and existing technologies to the reduction of the time and cost of licensing copyrighted materials. We believe that in the long run, both users and owners will benefit from this approach.

Indeed, history supports BMI's view. Music performing rights organizations here and abroad developed in large part because of the then "new" technologies

of recording and radio and television broadcasting. Rather than expediently denying the creators of music the fruits of their labors by making these public performances exempt, performance rights organizations such as BMI met the challenge of offering music users a fast, cost-effective means to license myriad works for a variety of uses. BMI continues to adapt to new technologies, having issued the first commercial Internet music license in April, 1995.

The educational community is well aware of BMI's efforts. Since 1978, BMI has worked closely with the American Council on Education ("ACE"), one of the largest and most highly regarded trade association of colleges and universities, as well as with the National Association of College and University Business Officers ("NACUBO") to negotiate music licenses on behalf of their members. The BMI license for colleges and universities is renegotiated every five years, the most recent agreement having been reached just last year. While Internet use was discussed, the parties decided that agreement on all other uses, ranging from orchestra performances to college radio, would be finalized, leaving the licensing of digital transmissions to be negotiated in good faith at a later date. These good-faith negotiations are ongoing and we look forward to continuing our ongoing dialog with ACE, NACUBO and other interested parties.

Moreover, issues regarding distance education were considered at great length during CONFU. Although no guidelines were ultimately adopted, there was a general consensus among the participants, including many from the educational community, that while copyrighted materials should be available in distance

education, there should be protections put in place so that there was not a wholesale copyright exemption and that licensing was a viable approach in many instances.

Music performing rights organizations are not alone in meeting the licensing challenges posed by advancing technology. News clipping services and other clearing houses came about to meet the challenge of quick and reasonable licensing of materials in light of court decisions holding that making multiple photocopies of articles does not constitute fair use. Just as music performing rights organizations came about and continue to evolve in order to meet the challenges posed by new technologies, BMI believes that other clearance organizations should be allowed to develop in order to license the display and reproduction rights for printed and audiovisual works. Indeed, at least one organization has already offered to act as a clearing house with respect to certain types of works with respect to distance education. See, *Submission of Copyright Clearance Center, Inc.* (Docket 98-12, document no. 126).

It is insufficient to say, as so many educational institutions do, that because licensing of copyrighted works for use on the Internet is currently too costly and too time consuming for them, a copyright exemption is therefore required. The Internet is being used more and more by all users, not just educators. Commercial enterprises are faced with the same problems. If we accept the proposition that there should be a legislative exemption for educators merely because the transactions costs are too high, every group will make the same argument, leading

to wholesale exemptions and eviscerating the rights of creators of works guaranteed under the Constitution. No further exemptions are needed. Given the present Section 110 exemption and new protections under the DMCA which educational institutions are now asserting, any further exemption would constitute an unwarranted third bite at the apple. Accordingly, BMI believes that any such legislative exemption would not constitute a solution to the problem of providing quick and affordable access to proprietary materials.

This is particularly true because so many educators are also writers, composers, artists and computer programmers. Indeed, professors writing on behalf of several universities properly recognized that users of copyrighted works and their creators are not mutually exclusive groups. In other words, they and their institutions would not only be users of copyrighted materials, but creators and owners of them as well through text books, scholarly articles, course syllabi and other materials. See, e.g., *Submission of National Association of Independent Colleges and Universities* (Docket 98-12; no. 124); *Submission of The Texas A&M University System* (Docket 98-12; no. 22). As distance education through digital technologies continues to become more and more prevalent, there will be less and less incentive for the creation of new educational materials, even by teachers themselves, if fewer and fewer people are required to pay for them. This would work to the detriment of owners and users alike. BMI has and will continue to work with all interested parties in formulating an approach acceptable to all and

which avoids such unintended consequences. A legislative exemption in favor of one group to the detriment of another should be discouraged.

IV. INTERNATIONAL IMPLICATIONS OF BROADENING EXEMPTIONS.

Before concluding, I would like to address one more reason for the Office to proceed with extreme caution in recommending the expansion of any exemptions under the Copyright Act. Doing so may have serious international implications. The United States is a signatory to the Berne Convention and the General Agreement on Tariffs and Trade agreement on Trade-Related Aspects of Intellectual Property Rights ("GATT/TRIPS"). Article 9(1) of GATT/TRIPS provides that "[m]embers shall comply with Articles 1 through 21 of the Berne Convention and the appendix thereto." If Congress were to enact a distance education exemption broader than exceptions for "fair use" and educational uses under Articles 9 and 10 of Berne, it may increase the possibility of our trading partners asserting violations of treaty obligations, which could, in turn, result in sanctions in the World Trade Organization ("WTO"). For example, several Congressmen, as well as the U.S. Trade Representative, the U.S. Patent and Trademark Office and the Register of Copyrights went on record to express concerns that the amendments broadening the exemption under Section 110(5) of the Copyright Act may violate, Berne, GATT/TRIPS or both, leading to possible sanctions in the WTO. *See 144 Cong. Rec. H9950-52 (daily ed., October 7, 1998).*

I want to thank the Register for giving me the opportunity to present BMI's views on so important a topic and we look forward to working with the Copyright Office other interested parties towards an appropriate resolution of these issues.

Respectfully submitted,

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